

Statement of

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**The Audio and Video Flags:  
Can Content Protection and Technological  
Innovation Coexist?**

**United States House of Representatives  
Committee on Energy and Commerce  
Subcommittee on Telecommunications  
and the Internet**

**June 27, 2006**

## Summary of Written Statement of Andrew W. Levin

Good afternoon, my name is Andrew W. Levin. I am the Executive Vice President and Chief Legal Officer for Clear Channel Communications, which operates 1150 local radio stations, 35 television stations, and 140,000 outdoor advertising displays worldwide. I am testifying today on behalf of the National Association of Broadcasters (NAB). NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and the Courts.

Free radio is currently investing huge human and financial capital to complete its own transition to digital broadcasting. Given the importance of the digital transition to consumers and broadcasters alike, the design and implementation of an audio broadcast flag must not compromise reasonable and lawful consumer expectations, or in any manner impede the successful rollout of digital radio.

Currently, 824 digital radio stations are on the air and broadcasters have individually committed to upgrade more than 2,000 stations to high definition (HD) radio technology this year, at a cost of \$100,000 per station in engineering alone. The possibilities are endless, and drive home the point that we need to make sure these technological innovations are not stopped dead in their tracks.

NAB has been diligently working with RIAA to develop and forge a consensus on a digital radio copy protection system that will not interrupt the digital roll out or create uncertainty that would lead to a slow down of adoption rates by manufacturers, consumers or even broadcasters. Thus, NAB does not believe that legislation mandating any particular system of digital radio copy protection is necessary or appropriate at this time. Rather, we encourage the committee to permit the parties' adequate time to work through these complicated issues.

There is one type of protection system that has been discussed that NAB strongly opposes: encryption at the source. No U.S. free, over-the-air broadcast service, analog or digital, has ever been required to encrypt its transmissions. Any encryption requirement would also likely risk stalling the digital radio transition by requiring a change in the technical digital radio broadcasting standard of such magnitude that a year's delay and likely more would be inevitable.

Further, the issue of an appropriate digital audio copyright scheme has been further complicated by the ongoing lawsuit by the recording industry against XM Satellite Radio, Inc. The federal court in that case will be addressing the very issue that is essential to the development of an audio flag, i.e., what constitutes "fair use" of a copyrighted work, especially by consumers. Any discussion about digital audio copy protection must take into account Congress' long-standing policy of protecting and preserving the public's right to make home recordings of sound recordings for personal use.

Nothing in the audio flag discussion is related to nor provides a basis to support a new performance right tax on broadcasters. Congress has consistently recognized that recording companies reap very significant promotional benefits from the exposure given their recordings by radio stations and that placing burdensome restrictions on performances could alter that relationship, to the detriment of both industries.

Finally, NAB believes Congress should legislate specific authority for the FCC to re-instate its regulations implementing a broadcast flag for digital television adopted in 2003. Although the D.C. Circuit Court of Appeals ultimately decided that the FCC lacked authority to impose regulations, the policy judgments explained in the agency decision remain valid and should be implemented. However, NAB opposes any attempt to exempt broadcasters' news or public affairs programs from the protection of the flag.

In sum, the deployment of digital radio is essential for terrestrial broadcasters to better serve their listeners and to remain competitive in today's digital media marketplace. Because of the importance of a timely and successful roll out of digital radio, any system to protect digital content must not impede the transition. In addition, the issues presented by the audio flag are complicated, involve numerous stakeholders, including consumers and their right to "fair use." NAB will continue to work with RIAA to develop a consensus on digital radio copy protection. Congress should allow this industry process to continue without the adoption of premature legislative mandates.

**Statement of Andrew W. Levin**  
**Executive Vice President and Chief Legal Officer**

Good afternoon, my name is Andrew W. Levin. I am the Executive Vice President and Chief Legal Officer for Clear Channel Communications, which operates 1150 local radio stations, 35 television stations, and 140,000 outdoor advertising displays worldwide. I am testifying today on behalf of the National Association of Broadcasters (NAB). NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and the Courts.

Like the television broadcast industry, free radio is currently investing huge human and financial capital to complete its own transition to digital broadcasting. Given the importance of the digital transition to consumers and broadcasters alike, our first and foremost concern is that any content protection scheme must do no harm. By that I mean that the design and implementation of an audio broadcast flag must not compromise reasonable and lawful consumer expectations, or in any manner impede the successful rollout of digital radio.

One thing I'd like to make perfectly clear at the outset: broadcasters oppose piracy in all shapes and forms. But in order to protect against unlawful uses, we believe that a well-vetted, industry-wide solution is the key to developing a system that balances the competing interests of everyone involved. And by everyone I mean, most especially, consumers who will either enjoy the great new benefits this technology can bring, or be left behind with fewer choices and less functionality. Too often it is consumers who are forgotten in the fractious bickering that takes place when new technologies are introduced

in the marketplace. We urge this committee to allow the broadcast industry, the recording industry and other vital stakeholders, including consumer groups, to continue working toward a consensus on a digital radio copy protection scheme.

**Any System to Protect Digital Content Must Not Impede the Digital Radio Roll-Out**

Digital audio broadcasting will enable broadcasters to better serve our local communities and to remain competitive in today's ever-expanding digital media marketplace. But we face many challenges as we work toward a successful and timely transition to digital radio. If radio is not allowed to continue this roll out on a timely basis, and remain competitive with other providers of digital audio content, the issue of digital radio copyright protection will quickly become moot. And, as we learned from the broadcast video flag process, there is no "quick fix" technical system to provide copy protection for digital media.

The radio industry in America has begun its massive roll out of digital broadcast transmissions and all-new digital radio receivers. Currently, 824 digital radio stations are on the air. Broadcasters have individually committed to upgrade more than 2,000 stations to high definition (HD) radio technology this year, at a cost of \$100,000 per station for engineering alone. In fact, Clear Channel Radio itself already has more than 238 stations offering broadcasts in HD digital quality today, and more are added every day. HD radio not only offers listeners crystal-clear audio, it also permits the broadcasting of an additional free, over-the-air program stream that will bring additional content (including much more local content) to the public on the radio stations' current allocation of spectrum.

In fact, the best part is that these additional streams are currently free of advertising. Clear Channel believes creating new, compelling formats is essential to the future of free radio. Hence, our company's Research and Development Group created the Format Lab in 2004 to create more than 75 brand new niche formats. These exciting new program formats are fully customized by our local programmers to meet the specific needs of their communities and thus create a new radio channel in HD markets all across the country.

This transition to digital radio will enable other great new services, including wireless data providing information such as song titles and artists or weather and traffic alerts. Even more innovative features are under development, such as program menus giving listeners instant access to a favorite drive time show, special music information, news, weather and traffic alerts that are not only local, but will be interoperable with a listener's in-car navigation system. The possibilities are endless, and drive home the point that we need to make sure these technological innovations are not stopped dead in their tracks. Digital radio will allow broadcasters to provide tremendous new services to consumers, and is the only way to remain a vital and vibrant part of the media landscape of the future.

But beyond thousands of radio stations converting to digital, the HD radio revolution also involves the consumer electronics industry and, most importantly, consumers. New digital radio receivers have been launched in the marketplace across a range of product categories. Major radio groups are engaged in a massive marketing campaign to promote digital radio to consumers through the creation of the HD Digital Radio Alliance. And automakers and after-market manufacturers are beginning to

produce digital radio products for car sound systems. 2006 and 2007 promise to be pivotal years for the roll-out of digital radio, with auto makers signing up for factory-installed radios, retail outlets prominently featuring many new digital radio products, and hundreds more broadcasters commencing digital transmissions. Given this investment by broadcasters and equipment manufacturers and the benefits that consumers will receive from a successful deployment of digital radio, it is of paramount importance that any copy protection mechanism not impede the digital radio rollout.

NAB has been diligently working with RIAA to develop and forge a consensus on a digital radio copy protection system that will not interrupt the digital roll out or create uncertainty that would lead to a slow down of adoption rates by manufacturers, consumers or even broadcasters. Thus, NAB does not believe that legislation mandating any particular system of digital radio copy protection is necessary at this time. Rather, we encourage the committee to permit the party's adequate time to work through these complicated issues.

### **Encryption at the Source Should be Rejected**

There is one type of protection system that has been discussed that NAB strongly opposes: encryption at the source. Such a mandate would be antithetical to the concept of free, over-the-air broadcasting. No U.S. free, over-the-air broadcast service, analog or digital, has ever been required to encrypt its transmissions. Any encryption requirement would also risk stalling the digital radio transition by requiring a change in the technical digital radio broadcasting standard that could delay the digital radio roll-out by more than one year. Unlike the video flag, encryption of DAB signals would obsolete receivers now in the field, as well as receivers and component parts currently in the production

pipeline. Resulting uncertainty in the marketplace and potential loss of confidence and interest in digital audio broadcasting by manufacturers now ready to roll out DAB receivers would harm broadcasters and threaten the public's receipt of digital radio.

**The Public's Right to Make Private Copies of Sound Recordings for Personal Use Must Be Taken Into Account**

The issue of an appropriate digital audio copyright scheme has been further complicated by the ongoing lawsuit by the recording industry against XM Satellite Radio, Inc.<sup>1</sup> The federal court in that case will be addressing the very issue that is essential to the development of an audio flag, *i.e.*, what constitutes "fair use" of a copyrighted work, especially by consumers. Indeed, any discussion about digital audio copy protection must take into account Congress' long-standing policy of protecting and preserving the public's right to make home recordings of sound recordings for personal use. The House Report accompanying the Sound Recording Act of 1971 stated:

HOME RECORDING

In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, *it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.*<sup>2</sup>

In the Audio Home Recording Act of 1992 ("AHRA"), Congress definitively addressed the issue of home recording of sound recordings and musical works, and in

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<sup>1</sup> *Atlantic Recording Corp., et al. v. XM Satellite Radio Inc.*, Docket No. 06 CV 3733 (S.D.N.Y.).

<sup>2</sup> H. Rep. No. 92-487, 92d Congress, 1<sup>st</sup> Sess. at 7 (Sept. 22, 1971) (emphasis added).



section 1008 provided an exemption for home copying. This Act was intended to be comprehensive, forward-looking legislation designed to end, once and for all, the “longstanding controversy” surrounding the home recording of prerecorded music.<sup>3</sup> Indeed, then-President of RIAA, Jay Berman, described the bill that became the AHRA as “a generic solution that *applies across the board to all forms of digital audio recording technology*.”<sup>4</sup>

The lawsuit against XM raises the question of whether the recording, downloading and creating of a personal library of copyrighted music is a permitted “fair use” under copyright law. The lawsuit centers on a recently released device called the Inno, which, among other uses, allows consumers to record up to 50 hours of XM’s programming. The Inno gives users the option of disaggregating songs from XM’s airing, and storing them on the device for later playback. Although the songs cannot be removed from the Inno, the recording industry’s suit asserts that the recording and disaggregating function equates with illegal downloading, and is therefore a copyright violation. XM has stated that the device was designed to comply with fair use principles and the AHRA. The resolution of this lawsuit could well impact the interpretation of what constitutes fair use and, thus, how any digital audio copy protection system should be designed and implemented under copyright law.

### **Congress Should Reject Efforts to Impose a Sound Recording Performance Right in Digital Broadcasts**

As NAB has stated numerous times, nothing in the audio flag discussion is related to nor provides a basis to support a new performance right tax on broadcasters.

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<sup>3</sup> See S. Rep. No. 102-294, 102d Cong., 2d Sess. 30, 51 (June 9, 1992).

<sup>4</sup> Hearing Before the Senate Subcommittee on Communications, S. Hrg. 102-908, Serial No. J-102-43, at 111 (Oct. 29, 1991) (statement of Jason Berman, President of RIAA) (emphasis added).

Throughout the history of the debate over sound recording copyrights, Congress has consistently recognized that recording companies reap very significant promotional benefits from the exposure given their recordings by radio stations and that placing burdensome restrictions on performances could alter that relationship, to the detriment of both industries. For that reason, in the 1920s and for five decades following, Congress regularly considered proposals to grant copyright rights in sound recordings, but repeatedly rejected such proposals.

When Congress did first afford limited copyright protection to sound recordings in 1971, it prohibited only unauthorized reproduction and distribution of records, but did not create a sound recording performance right. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, and rejected, granting a sound recording performance right. Congress continued to refuse to provide any sound recording performance right for another twenty years. During that time, the recording industry thrived, due in large measure to the promotional value of radio performances of their records.<sup>5</sup>

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. In granting this limited right, Congress stated it "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."<sup>6</sup> Consistent with this intent, the DPRA expressly exempted

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<sup>5</sup> See, e.g., S. Rep. No. 93-983, at 225-26 (1974) ("The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure on the promotion efforts of broadcasters.").

<sup>6</sup> S. Rep. No. 104-129, at 15 ("1995 Senate Report"); *accord, id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").

from sound recording performance right liability non-subscription, non-interactive transmissions, including “non-subscription broadcast transmission[s]” – transmissions made by FCC licensed radio broadcasters.<sup>7</sup>

In sum, the transition of traditional local radio stations from analog to digital presents no basis to alter fundamentally the long-standing mutually beneficial relationship between the recording and broadcasting industries by imposing a new performance right in digital broadcasts, when one does not exist in analog.

### **The DTV Broadcast Flag**

NAB believes Congress should legislate specific authority for the FCC to reinstate its regulations implementing a broadcast flag for digital television adopted in 2003. The DTV broadcast flag mechanism was developed over many years of intense negotiations by scores of participants from a wide array of industry sectors. The purpose, concept and methodology of the DTV flag were then debated at the FCC in voluminous comments and reply comments from affected industry and consumer groups, companies and organizations. Although the D.C. Circuit Court of Appeals ultimately decided that the FCC lacked authority to impose regulations, the policy judgments explained in the agency decision remain valid and should be implemented.

Further, NAB opposes any attempt to exempt local broadcasters’ news or public affairs programs from the protection of the flag. While broadcasters freely and widely distribute their news and public affairs programming, NAB believes it vitally important that broadcasters retain the right to protect their copyrighted news and public affairs programs, which typically are the main or only product of local broadcasters.

Unauthorized internet redistribution could well eviscerate the program exclusivity of

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<sup>7</sup> 17 U.S.C. § 114(d)(1)(A).

news or public affairs programs of stations in local markets, as well as undermine the original broadcast and its accompanying revenue by re-distributing programs across time zones, thus allowing Internet viewing *before* the original show is seen on local stations in western U.S. markets. Such results would wreak havoc on stations' audience ratings and threaten its continued viability.

### **Conclusion**

The deployment of digital radio is essential for terrestrial broadcasters to better serve their listeners and to remain competitive in today's digital media marketplace. Because of the importance of a timely and successful roll out of digital radio, any system to protect digital content must not impede the transition. In addition, the issues presented by the audio flag are complicated, involve numerous stakeholders, including consumers and their right to "fair use." NAB will continue to work with RIAA to develop a consensus on digital radio copy protection. Congress should allow this industry process to continue without the adoption of premature legislative mandates.